UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
v. 97 Cr. 111(LAP)
WILLIAM P. BRANSTON,
Defendant.

April 28, 1998
10:15 a.m.

Before:

HON. LORETTA A. PRESKA

District Judge
and a jury

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
GEORGE CANELLOS
RICHARD OWENS
Assistant United States Attorney

CHARLES ROSS
STEPHANIE CARVLIN
Attorney for Defendant

EXHIBIT 1

(Trial resumed)

(In open court, jury present)

THE COURT: Good morning. Members of the jury, we have reached the final stage in these proceedings before you begin your deliberations. As you know, that stage is called the court's charge – or instructions – to the jury.

We have all worked very hard to try to make this charge as clear and concise as possible, but it is necessarily still quite long and somewhat complex. So, your close attention will be appreciated.

As you can see, I have given each one of you a copy of the charge and you may take that copy with you into the jury room. For now, as I read the charge to you, you may follow along on your own copy or you may put the copy down and simply listen. The choice is yours.

I intend to stop for a break at the end of page 42 another, a short break at the end of page 83, so that you will not be glued to your chairs for the entire morning.

The charge does three basic things. First, it explains certain rules and procedures generally applicable to all criminal jury trials. Second, it explains the rules of law applicable to the specific statutes which this defendant is accused of violating. Third, and finally, it explains the procedures by which you may ask questions, request exhibits, and, in general, conduct your

deliberations.

Let me begin my remarks by thanking you, as counsel have thanked you, for your patience and your attentiveness during trial. Having paid careful attention to the evidence as it was presented to you during the trial, you are fully prepared to reach a verdict as to whether or not the government has sustained its burden of proof beyond a reasonable doubt as to each count against the defendant.

We have heard all of the evidence in the case as well as final arguments of the lawyers for both sides. My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of the law and to apply them to the facts as you determine them.

On these legal matters, you must take the law as I give it to you. If any attorney has stated legal principles different from any that I state to you in my instructions, it is my instructions you must follow. You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room. You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be – or ought to be – it would violate your sworn duty to base a verdict upon any view of the law other than that which I gave you.

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Your final role as jurors is to pass upon and decide the fact issues that are in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; that is, you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony; and you draw whatever reasonable inferences you decide to draw from the facts as you have determined them. I will discuss how to pass upon the credibility – i.e., believability – of the witnesses a bit later on in the charge.

In determining the facts, you must rely on your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing statements, in their objections, or in their questions is not evidence. In this connection, you should specifically bear in mind that a question put to a witness is not itself evidence. It is only the answer, taken in the context of the question that was asked, which is evidence. Nor is anything I say may have said during the trial or may say during these instructions with respect to a fact matter to be taken in substitution for your own independent recollection.

As I told you at the beginning of the trial, note-taking is allowed. If you took notes, they are to be used solely to assist you, and your notes are not to

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substitute for your recollection of the evidence in the case. The fact that a particular juror has taken notes entitles that juror's views to no greater weight than those of any other juror, and your notes are not to be shown to any other juror during the course of your deliberations.

If, during your deliberations, you have any doubt as to any testimony, you will be permitted to request that the official trial transcript which is being made of these proceedings be read to you.

The evidence before you consists of the answers given by the witnesses – the testimony they gave, as you recall it – the exhibits that were received in evidence, and the stipulations of the parties.

However, you may not consider any answer, testimony or exhibits that I directed you to disregard or that I directed be stricken from the record. If an answer has been stricken, it must be entirely disregarded as though the words were never spoken. Similarly, if an objection to a question was sustained before the witness answered, you must disregard the question entirely. You may draw no inferences from the wording of the question nor speculate about what the witness might have answered.

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence. All persons are entitled to the presumption of innocence, and it

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would be improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decision-making process.

It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about a defendant's race, religion, national origin, sex or age. All persons are entitled to the presumption of innocence and the government has the burden of proof, as I will discuss in a moment.

To repeat, your verdict must be based exclusively on the evidence or the back of evidence in the case.

Now, because you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during trial are not any indication of my views of what your decision should be as to whether or not the guilt of the defendant has been proven beyond a reasonable doubt.

I also ask you to draw no inference from the fact that on occasion I asked questions of certain witnesses. Those questions were intended only for clarification or to expedite matters but were not intended to suggest any opinions on my part. You are expressly to understand that the court has no opinion as to the verdict you should render

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in this case.

You should also note that it is the duty of the attorneys on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and request conferences at the sidebar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence or asked for a conference outside of the hearing of the jury or asked the court for a ruling on the law.

This is a portion that is included in the general charge, but as you will know as I read it, it is not so applicable here. In some trials the court has to admonish attorneys because it did not believe that what they were doing was proper. To the extent it happened here, I cannot remember that it did, you should draw no inference from that against them or their client. As I have already told you, it is the duty of the attorneys to offer evidence and to press objections on behalf of their side of the case. It is my function to cut off counsel from an improper line of argument or questioning and to warn counsel when I think it is necessary. But you should draw no inference from that.

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It is irrelevant whether you believe I like a lawyer or whether you like a lawyer. The issue before you is not which attorney is wittier or more likable or the better attorney – the issue is whether or not the government has sustained its burden of proof beyond a reasonable doubt. In addition, you should note that the attorneys themselves do not have personal knowledge of the facts in the case. Their role is that of advocates, not witnesses.

You are to perform your duty of finding the facts without bias or prejudice to any party. You are to perform your final duty in an attitude of complete fairness and impartiality.

The fact that the government is a party and that the prosecution is brought in the name of the United States of America does not entitle the government or its witnesses to greater consideration than that accorded to any other party. All parties, whether government or individuals, stand as equals at the bar of justice.

The defendant has pleaded not guilty, and thus the government has the burden of proving the charges against him beyond a reasonable doubt. This burden never shifts to a defendant for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

The law presumes a defendant to be innocent of

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all the charges against him. I therefore instruct you that the defendant is presumed by to you to be innocent throughout your deliberations until such time, if ever, that you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt.

A defendant begins a trial with a clean slate. This presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all of the evidence in a case.

I have said that the government must prove a defendant guilty beyond a reasonable doubt. The question naturally arises: "what is a reasonable doubt?" The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that the reasonable person would not hesitate to rely and act on it in the most important of his or her own affairs.

The law does not require that the government prove guilt beyond all possible doubt. Proof beyond a reasonable doubt is not a caprice or whim; it is not a

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speculation or suspicion; it is not an excuse to avoid the performance of an unpleasant duty; and it is not sympathy.

Let me repeat, however, that is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt. The defendant is under no duty to present evidence or to challenge the evidence presented by the government. Nor do you have to accept the testimony of any witness, even one who has not been contradicted or impeached, if you find that witness not to be credible. You must decide which witnesses to believe and which facts are true. To do this you must look at all the evidence, drawing upon your own common sense and personal experience.

If after a fair and impartial consideration of all of the evidence you have a reasonable doubt as to the guilt of the defendant, then it is your duty to acquit the defendant. On the other hand, if after a fair and impartial consideration of all of the evidence you are satisfied of the defendant's guilt beyond a reasonable doubt, then you must vote to convict.

You are about to be asked to decide whether or not the government has proved beyond a reasonable doubt the guilt of the defendant. You are not being asked to decide whether any other person has been proven guilty. Your verdict should be based solely on the evidence or lack of

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evidence as to this defendant, in accordance with my instructions and without regard to whether the guilt of any other person has or has not been proven.

Remember that only this defendant is on trial, not anybody else, and only for the crimes charged, not for anything else. You should consider evidence about the acts, statements, and intentions of others, and evidence about other acts of the defendant, only as they relate to these charges against the defendant.

You may not draw any inference, favorable or unfavorable, towards the government or the defendant on trial, from the fact that certain persons were not named defendants in the indictment or that alleged conspirators were not indicted. That these persons were not indicted must play no part in your deliberations.

Whether a person should be indicted as a defendant in this case is a matter within the sole discretion of the United States Attorney and the grand jury. Therefore, you may not consider it in any way in reaching your verdict as to the defendant on trial.

Mr. Branston did not testify in this case. Under our Constitution, he has no obligation to testify or to present any other evidence because it is the government's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecution throughout

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the entire trial and never shifts to the defendant. The defendant is never required to prove that he is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way in your deliberations in the jury room.

I have said several times that your verdict must be based upon the evidence or lack of evidence. Let me now give you some rules about the various types of evidence and about how you evaluate the testimony of witnesses. After that, I will discuss the specific charges against the defendant and what the government must show in order to satisfy its burden of proof.

As you remember from my initial remarks at the beginning of trial, the law recognizes two kinds of evidence, direct evidence and circumstantial evidence. You may rely on either type of evidence in reaching your decision. Evidence is direct when the facts are shown by exhibits which are admitted into evidence, or when the facts are sworn to by witnesses who have actual knowledge of them from something they have derived from the exercise of their senses, such as something they heard, something they saw, something they smelled, something they touched, and so on.

Circumstantial evidence is evidence which tends

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to prove a disputed fact by proof of other facts. You will remember the example we always talk about. Assume when you came into the courtroom this morning, the sun was shining and it was a nice day, as it was. Assume that the courtroom shades are drawn so you cannot look outside. Assume also, as we were sitting here, someone walked into the back of the courtroom with a dripping raincoat and umbrella. We cannot look outside of the courtroom and see if it is raining, we cannot stick our hand outside to feel if it is raining, so we have no direct evidence of whether or not it is raining. But on the combination of the facts that I have just asked you to assume, it would be reasonable and logical for you to conclude that it has been raining or to infer that it has begun to rain outside.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an established fact – that is, the raincoat and the umbrella – the existence or nonexistence of some other fact; that is, that it has begun to rain outside.

Circumstantial evidence is of no less value than direct evidence. It is a general rule of law that the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence of

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the case.

During the trial you may have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience and common sense, from one or more established facts, the existence or nonexistence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists.

There are times when different inferences may be drawn from different facts, whether proved by direct or circumstantial evidence. The government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you and you alone to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw – but not required to draw – from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your own common sense.

So, while you are considering the evidence presented to you, you are permitted to draw, from the facts

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you find to be proven, such reasonable inferences as would be justified in the light of your experience.

Here again, however, let me remind you that, whether based on direct or circumstantial evidence, or upon the logical and reasonable inferences drawn from such evidence, you must be satisfied of the guilt of the defendant beyond a reasonable doubt before you may convict.

In this case you heard certain evidence in the form of stipulations of testimony. Counsel on both sides worked very hard on those; they saved us a lot of trial time. Remember now that a stipulation of testimony is an agreement between the parties that, if called, a witness would have given certain testimony. You must accept as true the fact that the witness would have given that testimony. However, it is for you to determine the effect to be given to that testimony.

You have also heard evidence in the form of stipulations that contain facts which were agreed to be true, such as the fact that particular records are business records of a particular bank, securities firm or other entity. In such cases, you must accept those facts as true.

There has been a great deal said in the openings and summations of counsel as to whether various witnesses should be believed. I am sure that it is clear to you by now that you are being called upon to resolve various

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factual issues in the face of very different pictures painted by the government and by the defense which cannot be reconciled. You will now have to decide whether the government has proven guilt beyond a reasonable doubt, and an important part of that the decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you to decide the truth and the importance of each witness' testimony.

Let me first give you some general guidance about how to evaluate testimony. After that, I will discuss some additional issues raised by the witnesses who have testified in this particular case.

First, there is no magic formula for evaluating testimony. You bring to this courtroom all the experience and background of your lives in your everyday affairs. You determine for yourselves every day in a multitude of circumstances the reliability of statements which are made to you by others. The same tests that you use in your everyday matters of importance are the tests you use in your deliberations.

Your decision whether or not to believe a witness

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may depend on how that witness impressed you. Was the witness candid, frank and forthright? Or did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way in which the witness testified on direct examination compare with the way in which he or she testified on cross-examination? Was the witness' testimony consistent or self-contradicting? Did the witness appear to know what he or she was talking about and did the witness strike you as someone who was trying to report his or her knowledge accurately?

How much you choose to believe a witness may be influenced by the witness' bias. Does the witness have a relationship with the government or the defendant which may affect how he or she testifies? Does the witness have some incentive, loyalty or motive that might cause him or her to shade the truth? Or does the witness have some bias, prejudice or hostility that may have caused the witness, consciously or not, to give you something other than a completely accurate account of the facts that he or she testified about? You should also consider the witness' ability to express himself or herself. Ask yourselves whether the witness' recollection of the facts stands up in light of all the other evidence in the case.

If you find that any witness has willfully testified falsely as to any material fact, you have the

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right to reject the testimony of that witness in its entirety. On the other hand, even if you find that a witness has testified falsely or inaccurately about one matter, you may reject as false or inaccurate that portion of his or her testimony and accept as true any other portion of his or her testimony which recommends itself to your belief or which you find corroborated by other evidence in the case.

In essence, what you must try to do in deciding credibility to size up a person in light of his or her demeanor, the explanations given, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward and accurate in his or her recollection.

In deciding the question of credibility, remember that you should use your common sense, your good judgment and your experience.

If you find that any witness whose testimony you are considering may have an interest in the outcome of the this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony, and accept it without great care. This is not to say that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness' interest has affected or colored his or

Page

her testimony.

You have heard the testimony of certain law enforcement officials. The fact that a witness may be or may have been employed by the government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of any other witness. At the same time, it is quite legitimate for defense counsel to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give that testimony whatever weight, if any, you find it deserves.

During the course of this trial, you heard testimony from what the law calls expert witnesses. Although a witness is generally permitted to testify only to facts and not to express his or her opinions, the law permits the opinions of qualified experts on technical matters. An expert may testify as to his or her knowledge on a subject about which he or she has special knowledge. This testimony is permitted on the theory that the advice of a person experienced in special or technical subjects will

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assist you in determining the facts.
In weighing expert testimony, you may consider the expert's qualifications and opinion and his or her reason for testifying, if any. You may give his or her testimony such weight as you feel it deserves. You should not accept this witness' testimony merely because he or she is an expert. Nor should you substitute such a witness' testimony for your own reason, judgment, and common sense. The determination of facts in this case rests solely with you.
You have heard the testimony of certain witnesses who have been promised that in exchange for testifying truthfully, completely and fully, they will not be prosecuted for false testimony before the Securities and Exchange Commission or for certain other conduct. This promise was not a formal order of immunity by the court, but was arranged directly between the witness and the government.
The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed that you may convict a defendant on the basis of such a witness' testimony alone, if you find that that testimony proves the defendant guilty beyond a reasonable doubt.
However, the testimony of a witness who has been

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promised that he or she will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interests; for, such a witness, confronted with the realization that he or she can win his or her own freedom by helping to convict another, has a motive to testify falsely.
The prosecution has offered into evidence the actual letter of agreement in which the government has promised not to prosecute a witness under certain conditions. That agreement has been received so that you can have before you the actual terms under which the witness was promised immunity. I want to caution you that the agreement itself is no evidence that the witness has in fact testified truthfully. It may only be considered by you in deciding whether the witness has an interest in the outcome of this case which would motivate the witness to testify falsely, or whether it is in the witness' interest to testify truthfully, regardless of the outcome. In any event, you should accept this witness' testimony with great care. How much of it you choose to believe and the importance you wish to give to it are your decisions alone. After such scrutiny, you may give the testimony such weight,

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if any, as you believe it deserves.
You have heard witnesses who have testified that they were actually involved in planning and carrying out the crimes charged in the indictment. There has been a great deal said about these so-called accomplice witnesses in the summations of counsel and about whether or not you should believe them.
The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.
For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.
However, it is also the case that the accomplice testimony is of such nature that it should be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.
I have given some general considerations on credibility and I will not repeat them here, nor will I repeat all the arguments made on both sides. However, let me say a few things that you may want to consider during

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your deliberations on the subject of accomplices.
You should ask yourselves whether these so-called accomplices would benefit more by lying or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him or her to lie or was it one that would cause him or her to tell the truth? Did this motivation color the witness' testimony.
In sum, you should look at all of the evidence in deciding what credence or what weight, if any, you will want to give to the accomplice witnesses.
There are several persons whose names you have heard during the course of the trial but who did not appear here to testify, and one or more of the attorneys has referred to their absence from the trial. I instruct you that each party had an equal opportunity or lack of opportunity to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified to had they been called. Their absence should not affect your judgment in any way.
You should, however, remember my instruction that

the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

I am almost finished with these general instructions. During the course of the trial, I have instructed you that certain evidence was admitted only for a limited purpose – namely, not as evidence that what was said was true, but only as evidence that it was in fact said, together with whatever reasonable inferences can be drawn from that fact about the state of mind of the speaker or the listener. You must be careful to follow these instructions. Evidence admitted solely to permit inferences about state of mind cannot be considered as proof of the truth of what was said.

The defendant, William Branston, is formally charged in an indictment. The indictment is merely an accusation. It is simply the means by which this criminal case was commenced. The indictment itself is neither evidence, nor proof of a defendant's guilt. It does not create any presumption nor permit any inference that the defendant is guilty. You should therefore give no weight whatsoever to the fact that an indictment has been returned against the defendant.

The defendant has entered a plea of not guilty and, in so doing, has denied the essential elements of the

charges in the indictment, and has placed the burden upon the government to prove every element of the charges beyond a reasonable doubt. That is the government's burden of proof, as I have just explained to you.

The indictment in this case contains 16 counts. Count 1 charges the defendant with conspiring with others, including Peter Alsop and Eugene Deveney, to violate laws of the United States, specifically, the Investment Advisors Act of 1940 and the federal wire fraud statute.

Each of Counts 2 through 7 charges the defendant with violating the Investment Advisors Act or the federal wire fraud statute based on his alleged participation in distributing false and misleading advertising materials on behalf of Tandem Management. From time to time in these instructions, I will refer to the scheme that is the subject of these counts as the alleged marketing fraud scheme.

Each of Counts 8 through 12 charges the defendant with violating the Investment Advisors Act or the federal wire fraud statute based on his alleged participation in misappropriating "soft-dollar" credits managed in trust on behalf of clients of Tandem Management, without disclosure of that fact to clients and in violation of the representations made by Tandem. From time to time in my instructions, I will refer to the scheme that is the subject

of these counts as the alleged soft-dollar scheme.

So as to make our break coincide with your coffee, I will go on a few more pages until I am sure it has arrived for you.

Counts 13 through 15 charge the defendant with making false statements on registration applications filed on behalf of Tandem Management with the Securities and Exchange Commission.

Count 16 charges the defendant with committing perjury by testifying falsely under oath before the Securities and Exchange Commission.

You must, as a matter of law, evaluate each count separately and return a separate verdict of guilty or not guilty on each count of the indictment. I will explain to you the elements of each count shortly.

Lest you be concerned, you will have a verdict form with each count and a space for your recording a verdict as to each count. I will speak about that at the end of the charge.

As you know by now, the defendant has been indicted for a crime, and you each have a copy of the indictment which you may take into the jury room to assist you in your deliberations.

It is important for you to understand, as I said at the very outset of the trial and already this morning,

that an indictment is merely an accusation; it is not evidence of the crime charged; it is not proof of a defendant's guilt. The indictment is merely a method or procedure under the law whereby persons accused of crimes b the grand jury are brought into court to have their case tried by a trial jury such as yourselves. Therefore, the indictment must be given no evidentiary value but should be treated by you only as an accusation. No weight or significance whatsoever is to be given to the fact that an indictment has been brought against the defendant.

I will now turn to the specific charges in the case, beginning with Count 1 of the indictment. Count 1 charges the defendant with participating in a conspiracy to violate the laws of the United States. That portion of the indictment reads as follows:

"1. At all times relevant to this indictment, Tandem Management Inc. ('Tandem') was an investment adviso registered with the United States Securities and Exchange Commission ('SEC') under Section 203 of the Investment Advisors Act of 1940, with offices located in New York, New York. Tandem was in the business of investing in securities on behalf of individual and institutional clients who retained the firm to manage their assets. Tandem exclusively invested the assets of its clients and did not engage in any trading of securities on its own behalf.

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"2. At all times relevant to this indictment, William F. Branston, the defendant, held the positions of president and portfolio manager of Tandem, and was a co-owner of Tandem. Branston owned one/third of Tandem from the time of Tandem's formation in or about October 1991 until in or about June 1993, and owned one/half of Tandem after June 1993.

"3. At all times relevant to this indictment, Eugene B. Deveney ('Deveney'), a co-conspirator not named as a defendant herein, held the position of managing director and portfolio manager of Tandem, and was a co-owner of Tandem. Deveney owned one/third of Tandem from the time of Tandem's formation in or about October 1991 until in or about June 1993, and owned one/half of Tandem after June 1993.

"4. From the time of Tandem's formation in or about October 1991 until in or about June 1993, Peter S. Alsop ('Alsop'), a co-conspirator not named as a defendant herein, held the position of executive vice president of Tandem and owned one/third of Tandem. In June 1993, Alsop relinquished his interest in Tandem and ceased to have further association with the firm.

"5. In order to become registered as an investment advisor and to keep that registration current, Tandem filed with the SEC an application, and at least three

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amended applications, for registration on the applicable uniform application for investment advisor registration, known as a 'Form ADV.' Each of these forms ADV was signed and certified on behalf of William F. Branston, the defendant, and remained on public file with the SEC.

"6. Under the law, Tandem and its employees, including William F. Branston, the defendant, owed fiduciary obligations of good faith and loyalty to the clients who entrusted their money to Tandem's management. As a result, in investing the clients' money, Tandem and its employees were under the duties, among others, to act in the best interest of the clients and not to misappropriate funds of its clients.

"7. From the time of its formation until in or about March 1993, Tandem offered its clients a choice of two types of investment accounts: long-term investment accounts and short-term 'aggressive trading' accounts. Beginning in or about March 1993, Tandem also offered a variation of its short-term accounts, known as 'technical pattern trading' accounts.

"8. Tandem arranged for each investment advisory client to open an account in that client's name in a securities brokerage firm and to grant Tandem discretionary authority to manage the assets in that account. Each client executed a standard form investment advisory agreement ('the

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investment advisory agreement') that, among other things, gave Tandem the power to act as the client's attorney for purposes of managing the account for the benefit of the client.

"9. For those services Tandem charged a disclosed and agreed-upon fee. Pursuant to the investment advisory agreement, each client agreed to pay Tandem (a) an 'administrative' fee consisting of a specified percentage of the total assets managed by Tandem for the client, (b) a 'performance' fee based on profits earned by Tandem on assets of the client under management, or (c) a combination of an 'administrative' and a 'performance' fee.

"10. As set forth below, beginning almost immediately after Tandem's formation in late 1991 and continuing through in or about 1995, William F. Branston, the defendant, and other Tandem employees, including Deveney and Alsop, devised and put into effect an unlawful scheme to obtain money for themselves and to defraud Tandem's investment advisory clients by (a) making misrepresentations with respect to Tandem's historical performance in managing clients' assets; and (b) misappropriating for themselves, under the guise of obtaining 'soft-dollar' services from securities brokers, hundreds of thousands of dollars of client fund, without authorization, and through unlawful and deceptive means.

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"11. From in or about late 1991 through in or about late 1994, William F. Branston, the defendant, and other Tandem employees, in order to generate business for Tandem, prepared and distributed to clients and prospective clients marketing materials that misrepresented (i) the total amount of assets managed by Tandem and (ii) the historical rates of return earned on assets under management by Tandem, including the materials described below:

"a. Branston and other employees prepared and distributed on behalf of Tandem brochures that purported to show the rates of return for the year 1992 on the 'aggressive trading' accounts managed by Tandem. Each brochure reported that Tandem's clients obtained a rate of return in 1992 in excess of 30 percent. In fact, the 'aggressive trading' accounts managed by Tandem lost value in 1992 and thus had a negative rate of return;

"b. Branston and other employees prepared and distributed on behalf of Tandem a brochure that purported to show the annual and quarterly rates of return of a 'composite' of portfolios managed by Tandem under its long-term investment program. Although Tandem was not formed until late 1991, the brochure purported to show returns for 'Tandem' dating back to 1985 that substantially exceeded the performance of the S&P 500 in all but one year. The brochure stated that these returns were based on the

results of portfolios managed by Branston while he was employed at other investment management firms. In fact, during some of the periods for which these returns were reported, Branston was employed as a securities broker, not a portfolio manager, and did not have authority to manage assets for clients. During most other periods, the actual rates of return on portfolios managed by Branston were substantially less than those reported in the brochure. Moreover, the brochure represented that these rates of return were achieved on portfolios of securities with an average value of $700 million, when no such portfolio existed;

"c. Branston and other employees prepared and distributed a brochure for the purpose of promoting investment in a fund to be managed by Tandem under its 'technical pattern trading' program. The brochure stated that Tandem managed accounts under its 'technical pattern trading' program from 1989 to 1993 and earned annual rates of return on those accounts ranging from 26.9 percent to 47.7 percent. The brochure further stated that, as of January 1, 1994, Tandem managed $320 million of client assets, including $97 million in its 'technical pattern trading' accounts. In fact, all of these statistics were false. Tandem did not have a 'technical pattern trading' program until the spring of 1993, and did not manage assets

in the amounts reported in the brochure; and.

"d. Branston and other employees distributed with Tandem's marketing brochures the results of an annual survey by Nelson's, a publication serving the investment management industry, that ranked Tandem among America's 'Top 20 Money Managers' (i) for the year 1992 with respect to management of portfolios with a value of more than $100 million comprised of 'growth' stocks; (ii) for the year 1992 with respect to management of portfolios comprised of 'diversified growth' stocks of mid-sized corporations; and (iii) for the five-year period from approximately 1989 to approximately 1993 with respect to management of portfolios with a value of more than $100 million comprised of 'growth' stocks. According to Nelson's, Tandem earned an annual return of 21.4 percent on assets with a value of $128 million in 1992 and, from approximately 1989 to 1993, Tandem earned a five-year annualized rate of return of 24.08 percent on assets with a value of $220 million. In fact, these performance statistics were wholly fabricated by Branston who supplied them to Nelson's to induce Nelson's to publish them and to secure Tandem's ranking among the country's top money managers.

"12. William F. Branston, the defendant, made false representations with respect to the amount of assets managed by Tandem on forms filed with the SEC and made part

of the SEC's publicly available records. On a Form ADV dated March 29, 1993, Branston falsely reported that Tandem managed client assets with an aggregate value of $134 million. On a Form ADV dated March 11, 1994, Branston falsely reported that Tandem managed client assets with an aggregate value of $320 million.

"13. 'Soft-dollar' services are services provided by securities brokers for their customers to use in connection with the purchase and sale of securities. 'Soft-dollar' services typically consist of providing customers with investment-related data or products, such as research reports pertaining to companies or computer software, that aid the customers either in selecting securities or in valuing securities. Brokers who provide 'soft-dollar' services typically set aside a percentage of the commissions charged for securities transactions as a credit or rebate that may be used by the customers to purchase 'soft-dollar' services.

"14. Section 28(e) of the Securities Exchange Act of 1934 authorizes an investment manager to use 'soft-dollar' credits made available to its clients to pay for services that would otherwise be paid by the investment manager if (a) those services are limited to those classified as 'research' or 'brokerage' services, and (b) the investment manager determines in good faith that the

amount paid by the client or clients for such services is reasonable in relation to the value of the services, viewed either in terms of the particular transaction in which the commissions were paid or the investment manager's overall responsibilities with respect to the accounts as to which he exercises investment discretion.

"15. Pursuant to the investment advisory agreement executed by Tandem and its clients, Tandem had the authority,

'in effecting . investments, reinvestments, purchases and sales [for each client's account], to use and obtain the assistance and services of such brokers, dealers, investment bankers, underwriters, and other firms, enterprises and services as [Tandem] in the complete and unlimited exercise of [Tandem's] discretion shall designate and select, including the ability to arrange for third-party brokers to pay for any expenses which would otherwise be borne by [Tandem].'

"16. On Forms ADV filed with the SEC and provided to each of Tandem's clients, William F. Branston, the defendant, described the 'products, research and services' Tandem received from brokers and the factors Tandem considered 'in selecting brokers for its clients and in determining the reasonableness of their commissions' as follows:

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'The initial criteria that Tandem Management Incorporated applies in selecting a broker to effect a securities transaction for any of its clients is whether the broker can provide the best price and execution for the transaction. In accordance with Section 28(e) of the Securities Exchange Act of 1934, however, Tandem Management Inc. may select as brokers for its clients, those firms that furnish such research services as fundamental analyses of the economy, the political environment, the financial markets, specific industries, and/or individual securities. In following this policy, commissions may be paid that are higher than those obtainable from other brokers who do not provide research services. The research services provided by the broker used in a particular transaction is [sic] used to service all accounts. No formal procedures are used to direct client transactions to a particular broker in return for products and research services received. Brokers are regularly evaluated by Tandem Management Inc. to determine the value to clients' accounts derived from the services provided and the reasonableness of the commissions paid.'

"17. From in or about late 1991 through in or about early 1995, William F. Branston, the defendant, and other Tandem employees, entered into what purported to be 'soft-dollar' arrangements with, among others, Hoenig & Co. Inc. ('Hoenig'), Capital Institutional Services ('Capital'),

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Reynders Gray & Co., Inc. ('Reynders'), and Tiedemann International Research Inc. ('Teidemann'), hereafter referred to collectively as 'the Brokers.' These arrangements included the following terms:

"a. Tandem agreed to cause its clients to pay a Broker a specified commission (e.g., 7 cents a share) for executing purchases and sales of securities for Tandem's clients;

"b. The Broker agreed to set aside a large percentage of that commission as 'soft-dollar' credit. Those credits were available to Tandem to use to obtain 'soft-dollar' services on behalf of its clients; and

"c. Rather than providing the 'soft-dollar' services to Tandem or its clients directly, the Broker agreed to permit Tandem to use the 'soft-dollar' credits by purchasing goods or services from vendors of its choice and then submitting the invoices for these goods and services to the broker for payment or reimbursement.

"18. As described below, however, William F. Branston, the defendant, and other Tandem employees manipulated the 'soft-dollar' arrangements with Brokers to (a) convert the 'soft-dollar' credits available to Tandem for use on behalf of its clients into cash, and (b) divert the cash to their personal benefit. They did so by causing Brokers to 'reimburse' Tandem or themselves, in cash, for

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hundreds of thousands of dollars of purported 'soft-dollar' expenses that in fact had already been reimbursed or had never been incurred at all.

"19. Among the means by which William F. Branston, the defendant, effected this unlawful misappropriation were the following:

"a. Branston caused Tandem to submit the same invoice to more than one Broker, thereby obtaining multiple reimbursement for 'soft-dollar' expenses that Tandem paid only once;

"b. Branston caused Tandem to submit to Brokers altered versions of invoices that Tandem had previously submitted to that Broker, thereby obtaining multiple reimbursement for 'soft-dollar' expenses that Tandem had paid only once;

"c. Branston caused Tandem to submit to Brokers for reimbursement 'informational' invoices and other invoices that did not require payment or for which payment was excused, thereby obtaining reimbursement for expenses that Tandem did not pay at all; and

'd. Branston caused Tandem to submit to Brokers for reimbursement invoices for wholly fictitious expenses, including tens of thousands of dollars of invoices for a subscription to the data service of a vendor named 'First Call' which Tandem neither paid for nor received.

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"20. From in or about November 1993 through in or about 1995, William F. Branston, the defendant, and other Tandem employees, entered into an arrangement with Sherwood Securities ('Sherwood'), a brokerage firm, whereby Sherwood agreed to rebate in cash over half of the commissions paid by Tandem's clients for brokerage services. Under this arrangement, Tandem, as fiduciary for its clients, collected the rebated portion of the commissions. Rather than returning the rebates to Tandem's clients, however, Branston and other Tandem employees kept the rebates for themselves and Tandem.

21. As described above, the misappropriation of 'soft-dollar' credits and rebates with respect to the brokerage commissions paid by Tandem's clients was accomplished (a) in violation of the fiduciary obligations of Tandem and its employees, (b) in violation of the investment advisory agreement, and (c), by means of a Form ADV that misrepresented Tandem's soft-dollar practices, and unlawfully failed to disclose, among other material facts:

(i) that most of the 'soft-dollar' credits that Tandem's clients paid for were converted to the personal benefit of Tandem's employees and were not used to pay expenses related to Tandem's investment advisory business; (ii) that Tandem used 'soft-dollar' credits paid for by its clients for purposes other than obtaining 'such research services as

fundamental analyses of the economy, the political environment, the financial markets, specific industries, and/or individual securities,' including payment of its office rent, legal fees and other operating expenses; and (iii) that Tandem caused its clients to pay higher brokerage commissions to Sherwood in order to generate cash rebates for the benefit of Tandem and its employees.

"22. From in or about late 1991 until in or about 1995, in the Southern District of New York and elsewhere, William F. Branston, the defendant, and others known and unknown, including Deveney and Alsop, unlawfully, willfully and knowingly, did combine, conspire, confederate, and agree together and with each other to commit offenses against the United States, namely, to violate Title 15, United States Code, Sections 80b-6 and 80b-17, and Title 18, United States Code, Section 1343.

"23. It was a part and object of the conspiracy that William F. Branston, the defendant, and others known and unknown, including Deveney and Alsop, unlawfully, willfully, and knowingly would and did cause Tandem, by use of the mails or other means and instrumentalities of interstate commerce, directly and indirectly, to (a) employ devices, schemes, and artifices to defraud clients and prospective clients; (b) engage in transactions, practices, and courses of business which operated as a fraud and deceit

upon clients and prospective clients; and (c) engage in acts, practices, and courses of business which were fraudulent, deceptive, and manipulative, in violation of Title 15, United States Code, Sections 80b-6 and 80b-17, and Title 17, Code of Federal Regulations, Section 275.206(4)-1(a)(5).

"24. It was a further part and object of the conspiracy that William F. Branston, the defendant, and others known and unknown, including Deveney and Alsop, unlawfully, willfully, and knowingly would and did devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representation, and promises, and for the purpose of executing said scheme and artifice, would and did transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals, and sounds, in violation of Title 8, United States Code, Section 1343.

"25. Among the means and methods by which William F. Branston, the defendant, and others known and unknown, including Deveney and Alsop, would and did carry out the conspiracy were as follows:

"a. Branston and his co-conspirators would and did distribute to clients and prospective clients marketing materials that contained material misrepresentations and

omissions concerning the amount of assets under management by Tandem and the historical rates of return earned on those assets;

"b. Branston and his co-conspirators would and did file with the SEC Forms ADV that contained material misrepresentations and omissions concerning the amount of client assets under management by Tandem and Tandem's 'soft-dollar' practices; and

"c. Branston and his co-conspirators would and did, in violation of their fiduciary obligations to Tandem's clients and of the investment advisory agreement, misappropriate to themselves 'soft-dollar' credits and brokerage commission rebates that Tandem managed in trust on behalf of its clients."

At this point, ladies and gentlemen, having read that initial portion of the indictment, why don't we take a break, and then we will resume.

Thank you for your attention.

(Recess)

(Continued on next page)

(In open court; jury present)

THE COURT: Welcome back. Thank you for being so prompt. Did you decide if you wished a second break?

THE JURY: Yes.

THE COURT: What is the verdict, so to speak?

THE JURY: Yes.

THE COURT: Thank you.

THE JURY: The coffee drinkers want it.

THE COURT: I'm there. Won't you be seated, ladies and gentlemen.

Before our break, I had just turned to the first count in the indictment, and as I mentioned to you, that count charges the defendant with participating in a conspiracy to violate certain laws of the United States. I read to you that portion of that first count in the indictment. Now I'd like to resume on that first count and let you know that the relevant statute on this point is 18 U.S.C. Section 371. It provides in pertinent part as follows:

"If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the United States."

In this case, the defendant is accused of having been a member of a conspiracy to violate certain federal

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must have had a stake in the venture or in its outcome. You are instructed that while proof of a financial interest in the outcome of a scheme is not essential, if you find that the defendant had such an interest, that is a factor which you may properly consider in determining whether or not the defendant was a member of the conspiracy charged in the indictment.

As I mentioned a moment ago, before the defendant can be found to be a conspirator, you must find that he knowingly joined in the unlawful agreement or plan. The key question, therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement. It is important for you to know the defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements as well as those of the other alleged co-conspirators and the reasonable inferences that can be drawn from them.

The defendant's knowledge is a matter of inference from the facts proved. In this connection, I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every member, each and every other member, nor need he be apprised of all of their activities. Moreover, the defendant need not have been fully informed as to all of the

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details or the scope of the conspiracy in order to justify an inference of knowledge on his part.

Furthermore, the defendant need not have joined in all of the conspiracy's unlawful objectives. The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times.

Some conspirators may play major roles while others play minor roles in the offense. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of a conspiracy.

I want to caution you, however, that the defendant's mere presence at the scene of the alleged crime does not by itself make him a member of the conspiracy. Similarly, mere association with one or more members of the conspiracy does not automatically make the defendant a member. A person may know or be friendly with a criminal without being a criminal himself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy.

I also want to caution you that mere knowledge or

Page

acquiesence without participation in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant without knowledge merely happened to further the purposes or objectives of the conspiracy does not make the defendant a member. More is required under the law.

What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purposes of furthering the illegal undertaking. He thereby becomes a knowing and willing participant in the unlawful agreement; that is to say, a conspirator.

The third element that the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that at least one overt act was knowingly committed in furtherance of the conspiracy by at least one of the conspirators in the Southern District of New York at or about the time and place alleged. I instruct you as a matter of law that Manhattan falls within the geographic boundaries of the Southern District of New York.

The indictment charges that the following overt acts were committed in the Southern District of New York.

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26. In furtherance of the conspiracy and to effect its illegal objects, William F. Branston, the defendant, and others known and unknown, committed the following overt acts, among others, in the Southern District of New York and elsewhere:

A: On or about August 13, 1992, in New York, New York, Deveney transmitted by facsimile to MLR&L Partners a chart entitled "Aggressive management performance" that falsely represented that the short-term-aggressive-trading accounts managed by Tandem earned a 19 percent return in th first 7 months of 1992;

B. On or about February 24, 1993, in New York, New York, William F. Branston, the defendant, transmitted by facsimile to Nelson Publications for inclusion in Nelson Investment Managers Database a completed questionnaire in which he falsely reported that Tandem had total assets under management of $130 million as of December 31, 1992 and of $52 million as of December 31, 1991;

C. On or about March 29, 1993, in New York, New York, William F. Branston, the defendant, executed on behalf of Tandem a Form ADV that falsely reported that Tandem managed client assets with an aggregate market value of $134 million;

D. On or about June 16, 1993, in New York, New York, a member of the conspiracy transmitted by facsimile to

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laws – here, the Investment Advisors Act, which prohibits fraudulent conduct by investment advisors; and the federal wire fraud statute, which prohibits the use of interstate wire communication, including telephone calls and faxing, in furtherance of fraudulent schemes and artifices.

A conspiracy is a kind of criminal partnership, a combination or agreement of two or more persons to join together to accomplish some unlawful purpose. The crime of conspiracy to violate a federal law is an independent offense. It's separate and distinct from the actual violation of any specific federal laws, which the law refers to as "substantive crimes."

Indeed, you may find a defendant guilty of the crime of conspiracy to commit an offense against the United States even though the substantive crimes which were the object of the conspiracy were not actually committed.

Congress has deemed it appropriate to make conspiracy standing alone a separate crime even if the conspiracy is not successful. This is because collective criminal activity poses a greater threat to the public safety and welfare than individual conduct and increases the likelihood of success of a particular criminal venture.

In order to satisfy its burden of proof, the government must establish each of the following four essential elements beyond a reasonable doubt:

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1. That two or more persons entered the unlawful agreement charged in the indictment starting on or about late 1991 until on or about early 1995;

2. That the defendant knowingly and willfully became a member of the conspiracy;

3. That one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and

4. That the overt acts which you find to have been committed were committed to further some objective of the conspiracy.

The first element that the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in the indictment. In this instance, there were two unlawful purposes alleged to be the objects of the conspiracy: One, to violate the Investment Advisors Act; and, two, to violate the federal wire fraud statute.

The indictment alleges two distinct means by which each of these objects was to be accomplished: One, by distributing to clients and prospective clients advertisements and other marketing materials that contained misrepresentations concerning the amount of assets under management by Tandem and its principals and the historical rates of return earned on those assets; and, two, by

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misappropriating soft-dollar credits managed in trust on behalf of clients of Tandem Management, without disclosure of that fact to clients and in violation of representations made by Tandem.

In order for the government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any formal or express agreement. Similarly, you need not find that the alleged conspirators stated in words or writing what the scheme was, its object or purposes or every precise detail of the scheme or the means by which its object or purpose was to be accomplished.

What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act. You may, of course, find that the existence of such agreement to disobey or disregard the law has been established by direct proof. However, since conspiracy is by its very nature characterized by secrecy, you may also infer its existence from the circumstances of the case and the conduct of the parties involved.

In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in determining whether an agreement existed here, consider the actions and statements of all

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those you find to be participants as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose.

The second element that the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the defendant knowingly, willfully and voluntarily became a member of the conspiracy.

"Knowingly" means to act voluntarily and deliberately rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something that the law forbids; that is to say, with a bad purpose, either to disobey or disregard the law.

If you are satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who the members of that conspiracy were. Deciding whether the defendant was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly and willfully joined in the conspiracy.

Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as a leader, associate or worker.

In that regard, it's been said that in order for a defendant to be deemed a participant in a conspiracy, he

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a securities broker in Chestnut Hill, Massachusetts, a chart entitled "Aggressive management performance" that falsely represented that the short-term-aggressive-trading accounts managed by Tandem earned a 30.7 percent return in 1992;

E. On or about August 17, 1992, in New York, New York, William F. Branston, the defendant, transmitted by facsimile to Reynders an instruction to reimburse Tandem using soft-dollar credits of Tandem's clients for two invoices issued by the Hanseatic Group, Inc. in the amount of $12,000;

F. On or about February 26, 1993, in New York, New York, William F. Branston, the defendant, transmitted by facsimile to Capital in Dallas, Texas an instruction to reimburse Tandem using soft-dollar credits of Tandem's clients for an invoice issued by Standard & Poor's Compustat Services in the amount of $13,801.87;

G. On or about March 23, 1993, in New York, New York, William F. Branston, the defendant, transmitted by facsimile to Hoenig an instruction to reimburse Branston personally using soft-dollar credits of Tandem's clients for an invoice issued by Global Information Technologies, Inc. in the amount of $12,000.

Now, the purpose of this overt act requirement is clear. There must have been something beyond mere agreement. Some overt step or action must have been taken

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by at least one of the conspirators in furtherance of the conspiracy.

In order for the government to satisfy this element, it's not required that all of the overt acts alleged in the indictment be proven. In addition, you may find that overt acts were committed which are not alleged in the indictment. The only requirement is that one of the conspirators, not necessarily the defendant, knowingly committed an overt act in furtherance of the conspiracy in the Southern District of New York during the life of the conspiracy. Further, the overt act need not have been committed at precisely the time alleged in the indictment. It is sufficient if you are convinced beyond a reasonable doubt that it occurred at or about the time and place stated.

The fourth, and final, element which the government must prove beyond a reasonable doubt is that the overt act was committed for the purpose of carrying out the unlawful agreement.

In order for the government to satisfy this element, it must prove beyond a reasonable doubt that at least one overt act was knowingly and willfully done by at least one conspirator in furtherance of some object or purpose of the conspiracy as charged in the indictment. In this regard, you should bear in mind that the overt act

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standing alone may be an innocent and lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. You are, therefore, instructed that the overt act does not have to be an act which in and of itself is criminal or constitutes an objective of the conspiracy.

We have now finished Count 1, the conspiracy count of the indictment.

I come now, ladies and gentlemen, to the so-called substantive counts of the indictment, but before I come to that, I would like to say something to you in further clarification of the difference between the conspiracy count and the substantive counts. The violations charged in Counts 2 through 12 are also alleged to be objectives of the conspiracy charged in Count 1 which you just considered.

Conspiracy, as you'll recall, is a crime separate from the violations that form its objectives. Think about that just for a minute. Conspiracy is a separate crime from the violations that form its objectives. Because the government contends that the substantive violations actually occurred, the defendant is charged in the indictment with the substantive offenses as well as with the conspiracy.

Counts 2 through 7 charge the defendant with

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violations of the Investment Advisors Act and federal wire fraud statute based on his alleged participation in the marketing fraud scheme.

Counts 8 through 12 charge the defendant with violation of those same statutes based upon his alleged participation in the soft-dollar scheme.

I'll now explain the elements of these alleged substantive offenses beginning with Counts 2 through 5. Counts 2 through 5 charge Mr. Branston with violating Section 206 of the Investment Advisors Act, which is the general antifraud provision of that act. Section 206 provides in pertinent part as follows:

"It shall be unlawful for any investment advisor, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly:

One, to employ any device, scheme or artifice to defraud any client or prospective client;

Two, to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client;

Four, to engage in any act, practice or course of business which is fraudulent, deceptive or manipulative.

Counts 2 through 5 read as follows. Paragraph 27. This, of course, is from the indictment. The allegations of Paragraphs 1 through 9, 11 through 12 and 26

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A through D are repeated and realleged as though fully set forth herein. I have read you those before. I will not read them again.

28. On or about the date set forth below, in the Southern District of New York and elsewhere, William F. Branston, the defendant, unlawfully, willfully and knowingly, did cause Tandem, by the use of the mails and other means and instrumentalities of interstate commerce, directly or indirectly to:

A: Employ devices, schemes and artifices to defraud the following clients;

B. Engage in transactions, practices and courses of business which operated as a fraud and deceit upon the following clients; and

C. Engage in acts, practices and courses of business which were fraudulent, deceptive and manipulative in connection with the solicitation of the following clients, including, by directly and indirectly, publishing, circulating and distributing, in contravention of Title 17, Code of Federal Regulations, Section 275.2064-185, advertisements which contained untrue statements of material fact and which were otherwise false and misleading;

Count 2. The client is Oxbridge Associates, LP. The approximate time period in which that client retained Tandem was October 1993 through June 1994.

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Count 3. Client: Peter Greenfield. Approximate time period the client retained Tandem was October 1993 to October 1994.

Count 4. MLR&R Partners. The approximate time period is August 1992 through January 1994.

Count 5. The client is the Pooled Employee Trust Fund of the Bank of Boston Growth Equity Fund. The time period is approximately June, 1993 through August 1994.

To find the defendant guilty of violating the Investment Advisors Act as charged in Counts 2 through 5, the government must establish the following four elements:

1. That Tandem was an investment advisor;

2. That the defendant, acting on behalf of Tandem, either: (1) Employed a device, scheme or artifice to defraud the client named in the count you are considering; or (2) engaged in a transaction, practice or course of business which operated as a fraud and deceit upon that client;

3. That the defendant devised or participated in such device, scheme or artifice to defraud or such fraudulent transaction practice or course of business knowingly and willfully and with the intent to defraud; and.

4. That the defendant employed such device, scheme or artifice to defraud, or engaged in such transaction, practice or course of business by use of the

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mails or any other instrumentality of interstate commerce.

Let's discuss each of those four elements. In order to satisfy the first element, the government must prove beyond a reasonable doubt that Tandem was an investment advisor. For the purposes of the statute, an investment advisor includes any person or company which for compensation engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in purchase or selling securities.

The second element of the Investment Advisors Act charges requires the government to establish beyond a reasonable doubt that the defendant participated in a scheme or artifice to defraud the client named in the count of the indictment that you're considering.

The language describing this first element is almost self-explanatory. A scheme or artifice is simply a plan for the accomplishment of an object. A scheme or artifice to defraud is any plan, device or course of action to obtain money or property by means of false or fraudulent pretenses, misrepresentations or promises reasonably calculated to deceive persons of average prudence.

"Fraud" is a general term which embraces all various means by which human ingenuity can devise and whicl are resorted to by an individual to gain an advantage over

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another by false misrepresentations, suggestions or suppression of the truth or deliberate disregard of the truth.

Thus, a scheme or artifice to defraud is merely a plan to deprive another of money or property by trick, deceit, deception or swindle.

A statement, representation, claim or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made. A representation or statement is fraudulent if it was falsely made, with the intention to deceive.

Deceitful statements or half-truths or the concealment of material facts and the expression of an opinion not honestly entertained may also constitute false or fraudulent statements under the statute. The deception need not be premised on spoken or written words alone. The arrangement of the words or the circumstances in which they are used may convey the false and deceptive appearance.

If there is deception, the manner in which it is accomplished is immaterial. The false or fraudulent misrepresentation must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person who is relying upon the representation or statement in making a decision. This means that if you find a particular

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statement of fact to be false, you must determine whether that statement was one that a reasonable person or investor might have considered important in making his or her decision. The same principle applies to fraudulent half-truths or omissions of material fact.

In order to establish a scheme to defraud, the government is not required to establish that the defendant himself originated the scheme to defraud. It is sufficient if you find that a scheme to defraud existed even if originated by another and that the defendant knowingly participated in it.

Furthermore, it is not necessary for the government to establish that the defendant realized any gain from the scheme or that the intended victim actually suffered any loss. However, the government must prove that the alleged scheme contemplated depriving another of money or property.

In this case, it so happens that the government contends that the scheme succeeded and the victims were defrauded. The question for you to decide is did the defendant knowingly devise or participate in a scheme to defraud and to obtain money. Whether or not the scheme actually succeeded is not a question you may consider in determining whether the scheme existed. It is enough if you find that a false statement or a statement omitting material

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facts was made as a part of a fraudulent scheme in the expectation that it would be relied on by the person or entity named in the count of the indictment that you're considering. You must concentrate on whether there was such a scheme, not on the consequences of the scheme.

Finally, a scheme to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case.

If you find that the government has sustained its burden of proof that a scheme to defraud did exist as charged, you next should consider the third element. The third element of the Investment Advisors Act charges requires the government to establish beyond a reasonable doubt that the defendant participated in the scheme to defraud knowingly, willfully and with the specific intent to defraud.

I have already explained to you the terms "knowing" and "willful" in the context of instructing you on the second element of the conspiracy charge. These terms carry the same meaning in all the charges of the indictment.

"Intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of depriving another of money or property. The question of whether a person acted knowingly, willfully with intent to defraud is a question of fact for you to determine like any

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other fact question. This question obviously involves someone's state of mind. Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case that it would be shown that a person wrote or stated that as of a given time in the past, he committed an act with a fraudulent intent. Such direct proof is not required, however.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that can be drawn from them. Circumstantial evidence, if believed, is of no less value than direct evidence. In either case, the essential elements of the crime must be established beyond a reasonable doubt.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of the defendant is a complete defense to these charges. A defendant, however, has no burden to establish the defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt. Even false misrepresentations or statements or omissions of material fact do not amount to a

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fraud unless done with fraudulent intent. However misleading or deceptive the plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

As a practical matter, then, in order to sustain the charges against the defendant, the government must establish beyond a reasonable doubt that he knew his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme for the purpose of depriving another of money or property.

The government can also meet its burden of showing that the defendant had knowledge of the falsity of the statements if it established beyond a reasonable doubt that he acted with deliberate disregard of whether the statements were true or false or with a conscious purpose to avoid learning the truth.

If the government establishes that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant actually believed the statements to be true. This guilty knowledge, however, cannot be established by demonstrating that the defendant was merely negligent or foolish.

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If you find that the government has established beyond a reasonable doubt that the defendant participated in the scheme to defraud knowingly, willfully, and with the specific intent to defraud, then you should consider the fourth element.

The final element that the government must prove beyond a reasonable doubt on these charges is that the defendant knowingly used or caused to be used the mails, interstate telephone communications or wire communications in furtherance of the scheme to defraud or the fraudulent conduct alleged in the indictment.

It is not necessary that the defendant be directly or personally involved in the mailing. If the defendant was an active participant in the scheme and took steps or engaged in conduct which he knew or could reasonably foresee would naturally and probably result in the use of the mails or interstate wires, then you may find that he caused them to be used.

When one does an act with the knowledge that the use of interstate means of communication will follow in the ordinary course of business, or where such use can reasonably be forseen, even though not actually intended, then he causes such means to be used.

Nor is it necessary that the items sent through the mails contain the fraudulent material or anything

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criminal or objectionable. The matter mailed may be entirely innocent.

The use of the mails need not be central to the execution of the scheme and may even be incidental to it. All that is required is that the use of the mails bear some relation to the object of the scheme or fraudulent conduct.

I turn now, ladies and gentlemen, to Count 6, which is closely related to Counts 2 through 5. Count 6 charges the defendant with violating Section 1433 of Title 18 of the United States Code, which is the federal wire fraud statute. That section provides in pertinent part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio or television communications in interstate commerce any writings, signs, signals, picture or sounds for the purpose of executing such scheme or artifice, shall by guilty of a crime."

In this case, the defendant is charged with devising and participating in the same scheme that is the subject of Counts 2 through 5 of the indictment, a scheme to defraud clients and prospective clients of Tandem Management, by distributing false and misleading advertising materials on behalf of Tandem Management.

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In this count, the defendant is alleged to have used wires in furtherance of the scheme by causing a telefacsimile of a chart purporting to show the historical rates of return of the short-term, "aggressive trading" accounts managed by Tandem to be sent from New York, New York, to a witness in this case, Robert Barker of the firm of Smith Barney & Co. in Chestnut Hill, Massachusetts.

Count 6 reads as follows:

29. The allegations of Paragraphs 1 through 9, 11 through 12 and 26 A through D are repeated and realleged as though fully set forth herein. I will not reread them.

30. In or about June 1993, in the Southern District of New York and elsewhere, William F. Branston, the defendant, unlawfully, willfully and knowingly, having devised and intending to devise a scheme, an artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing said scheme and artifice, did transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals and sounds, namely, a telefacsimile sent from New York, New York to Chestnut Hill, Massachusetts of a chart purporting to show the historical rates of return of the short term, "aggressive trading" accounts managed by Tandem.

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In order to prove the defendant guilty of the wire fraud count, the government must establish beyond a reasonable doubt the following three elements:

First, that there was a scheme or artifice to defraud or obtain money or property by false and fraudulent pretenses, representations or promises, as alleged in the indictment at or about the time alleged in the indictment;

Second, that the defendant knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud, and;

Third, in execution of that scheme, the defendant used, or caused to be used, interstate wire facilities in furtherance of the scheme as specified in the indictment.

With regard to the first two elements, the instructions that I've just read to you concerning the second and third elements of the Investment Advisors Act charges, Counts 2 through 5, apply here as well: (1) the existence of a scheme to defraud; and (2) defendant's knowing and willful participation in the scheme with the intent to defraud.

I'll now explain the third element of this Count 6. The third and final element that the government must establish beyond a reasonable doubt is the use of interstate wire facilities in furtherance of the scheme to defraud.

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The use of the wire facilities must be between different states. In this case, as I've said, the indictment alleges that a telefacsimile transmission was sent from New York to Massachusetts. The transmitted matter need not contain a fraudulent representation or purpose or request for money.

It must, however, further or assist in the carrying out of the scheme to defraud. It is not necessary for the defendant to be directly or personally involved in any wire communication as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating. This wire communication requirement is satisfied even if the wire communication was done by a person with no knowledge of the fraudulent scheme.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the defendant caused the wires to be used by others. This does not mean that the defendant must specifically have authorized others to send a communication over the wires. When one does an act with knowledge that the use of the wire will follow in the ordinary course of business, or where such use of the wires can reasonably be forseen even though not actually intended, then the defendant caused the wires to be used.

The government must establish beyond a reasonable

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doubt the particular use charged in the indictment. However, the government does not have to prove that the wire was used on the exact date charged in the indictment. It is sufficient that the evidence establishes beyond a reasonable doubt that the wire was used on a date substantially similar to the date charged in the indictment.

I now turn to Count 7 of the indictment, the final charge relating to the alleged fraudulent marketing scheme. Count 7 charges the defendant with violating the Investment Advisors Act through conduct prohibited by a Securities & Exchange Commission rule that bars false advertising by investment advisors. The provision of the Investment Advisors Act that is alleged to have been violated, Section 206 (4), provides in pertinent part as follows:

"It shall be unlawful for any investment advisor, by the use of the mails or any other means or instrumentality of interstate commerce, directly or indirectly, to engage in any act, practice or course of business which is fraudulent, deceptive or manipulative."

The Securities & Exchange Commission's false advertising rule provides, in pertinent part, as follows:

"It shall constitute a fraudulent, deceptive or manipulative act, practice or course of business within the meaning of Section 206 (4) of the Investment Advisors Act

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for any investment advisor, directly or indirectly, to publish, circulate or distribute any advertisement which contains any untrue statement of a material fact or which is otherwise false and misleading."

Now, this count, Count 7 of the indictment, reads as follows:

31. The allegations of Paragraphs 1 through 9, Paragraph 11 C are repeated and realleged as though fully set forth herein.

32. In or about 1994, in the Southern District of New York and elsewhere, William F. Branston, the defendant, unlawfully, willfully and knowingly did cause Tandem, by use of the mails and of other means and instrumentalities of interstate commerce, directly and indirectly, to engage in acts, practices and courses of business which were fraudulent, deceptive and manipulative, by directly and indirectly publishing, circulating and distributing, in contravention of Title 17, Code of Federal Regulations, Section 275.206 (4) through 1(A)(5), an advertisement that contained untrue statements of untrue fact and that was otherwise false and misleading; namely, a brochure prepared for the purpose of promoting investment in the Parallax Fund, Limited, that falsely represented the historical rates of return of technical pattern trading accounts managed by Tandem, the value of assets managed by

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Tandem in technical pattern trading accounts, and the aggregate value of client assets managed by Tandem.

Now, to find the defendant guilty of violating the Investment Advisors Act through false advertising, the government must establish beyond a reasonable doubt the following four elements:

First, that Tandem was an investment advisor;

Second, that the defendant, acting on behalf of Tandem, participated, directly or indirectly, in publishing, circulating or distributing an advertisement which contains an untrue statement of material fact, or which is otherwise false or misleading as to a material fact;

Third, that the defendant participated in publishing, circulating or distributing the false or misleading advertisement knowingly and willfully; and

Fourth, that the conduct violating the rule involved the use of the mails or any means or instrumentality of interstate commerce.

For the purposes of this rule, the term "advertisement" includes any notice, circular, letter or other written communication addressed to more than one person or any notice or other announcement in any publication over radio or television which offers any investment advisory service with regard to securities.

I have already explained to you the other terms

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and concepts relevant to this charge, including the meaning of "investment advisor," "material fact," "False or misleading statement," "willful and knowing" conduct and of using the mails and instrumentalities of interstate commerce.

In addition, what I've said about the requirement of participation in a fraudulent scheme also holds true for this charge. It is not necessary that a participant be someone who personally and visibly circulates or distributes a false or misleading advertisement. It is sufficient if you find that the defendant caused the making of a false or misleading statement, with knowledge that it was false or misleading, or that he knowingly and intentionally aided and abetted another person in making a false or misleading statement.

Moreover, in proving the defendant's knowledge of the falsity of the statement contained in the relevant advertisement, the government can also meet its burden of proof by establishing beyond a reasonable doubt that the defendant acted with deliberate disregard of whether the statement was true or false or with a conscious purpose to avoid learning the truth, as I've already explained those terms to you.

In this case, the indictment charges that the alleged advertisement contained three misrepresentations:

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First, the historical rates of return of technical pattern trading accounts managed by Tandem; Second, the value of assets managed by Tandem in technical pattern trading accounts; and Third, the aggregate value of client assets managed by Tandem.

For the purpose of determining whether the government has satisfied its burden in proving that the defendant had the requisite knowledge of the falsity of the advertisement, you need not find that he knew that all three representations were false and misleading. It is sufficient if you find that the defendant had the requisite knowledge of one false or misleading statement with respect to a material fact. You must all agree, however, on which material fact or facts were knowingly misstated.

I now turn, ladies and gentlemen, to the substantive charges of the indictment relating to the alleged soft-dollar scheme, Counts 8 through 12.

Counts 8 through 11 charge the defendant with violating Section 206 of the Investment Advisors Act, and Count 12 charges the defendant with violating the federal wire fraud statute. I have already read to you the relevant portions of those laws. I will now read to you Counts 8 through 11 of the indictment.

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33. The allegations of Paragraphs 1 through 9, 13 through 21, and 26 E through G, are repeated and realleged as though fully set forth herein.

34. On or about the dates set forth below, in the Southern District of New York and elsewhere, William F. Branston, the defendant, unlawfully, willfully and knowingly did cause Tandem, by the use of the mails or other means and instrumentalities of interstate commerce, directly and indirectly to:

A: Employ devices, schemes and artifices to defraud the following clients;

B. To engage in transactions, practices or courses of business which operated as a fraud and deceit upon the following clients; and

C. Engage in acts, practices and courses of business which were fraudulent, deceptive and manipulative.

Count 8. The client is alleged to be Oxbridge Associates, LP. The approximate time period of the misappropriation is October 1993 through June of 1994.

Count 5. The client is Peter Greenfield. The approximate time period of misrepresentation is October 1993 through October 1994.

Count 10. MLR&R Partners. The approximate time period is June 1992 through January 1994.

Count 11. Pooled Employee Trust Fund of Bank of

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Boston Growth Equity Fund. Time period is June 1993 through August of 1994.

Count 12 reads as follows:

35. The allegations of Paragraphs 1 through 9, 13 through 21, and 26 E through G, are repeated and realleged as though fully set forth herein.

36. On or about February 26, 1993, in the Southern District of New York and elsewhere, William F. Branston, the defendant, unlawfully, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing said scheme and artifice, did transmit or cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals and sounds; namely, a telefacsimile from New York, New York to Dallas, Texas, of a letter that instructed Capital to reimburse Tandem using soft-dollar credits of Tandem's clients, for an invoice issued by Standard & Poor's Compustat Services, in the amount of $13,801.87.

In instructing you on the charges relating to the alleged fraudulent marketing scheme, I explained the elements of a violation of Section 206 of the Investment Advisors Act and the federal wire fraud statute. The same

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elements must be established beyond a reasonable doubt to find the defendant guilty of an Investment Advisors Act or wire fraud charge relating to the alleged soft-dollar scheme.

However, there are differences between the allegations of the marketing fraud scheme and the soft-dollar scheme that require some additional explanation.

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The marketing fraud scheme is based upon explicit misrepresentations alleged to have been made in brochures and other marketing materials distributed on behalf of Tandem Management. The soft-dollar scheme is based upon alleged implicit and explicit misrepresentations, as well as on other alleged violations of duties of disclosure and candor that the defendant owed to clients of Tandem Management in his capacity as a fiduciary of those clients. The allegations relating to the scheme are as follows.

First, the indictment alleges that the Form ADV publicly filed on behalf of Tandem Management misrepresented that the firm selected brokers for its clients and determined the reasonableness of their commissions in accordance with Section 28(e) of the Securities Exchange Act of 1934. I have already read to you the alleged representations contained in the Form ADV on that subject.

Section 28(e) provides that an investment advisor may cause an account managed by the advisor "to pay [a] broker . or dealer [of securities] an amount of commission for effecting a securities transaction in excess of the amount of commission another . broker . or dealer would have charged for effecting that transaction, if [the investment advisor] determined in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research services provided by such

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. broker . or dealer, viewed in terms of either that particular transaction or [the advisor's] overall responsibilities with respect to the accounts as to which he exercises investment discretion."

The indictment alleges that the representations contained in the Form ADV were false and misleading in that the Form ADV failed to disclose to clients and prospective clients: (1) that most of the soft-dollar credits paid by Tandem's client were converted to the personal benefit of Tandem's employees and were not used to pay expenses related to Tandem's investment advisory business; (2) that tandem used soft-dollar credits paid for by its clients for purposes other than obtaining "such research services as fundamental analyses of the economy, the political environment, the financial markets, specific industries, and/or individual securities," including payment of its office rent, legal fees and other operating expenses; and (3) that Tandem caused its clients to pay higher brokerage commissions to Sherwood Securities in order to generate cash rebates for the benefit of Tandem and its employees.

Second, the indictment alleges that an investment advisory agreement provided to clients of Tandem Management misrepresented how the defendant and other principals of Tandem intended to use commissions that Tandem Management caused its clients to pay brokers for executing purchases

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and sales of securities. I have already read to you the indictment's allegations on this subject.

Third, the indictment alleges that the defendant violated fiduciary duties owed to the clients of Tandem Management by participating in the misappropriation of soft-dollar credits managed in trust on behalf of Tandem Management's clients.

There is one other concept which I have not previously explained to you, the concept of a "fiduciary capacity." One acts in a "fiduciary capacity" when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. A fiduciary relationship involves discretionary authority and dependency – one person depends on another – the fiduciary – to serve his interests. In relying on a fiduciary to act for his benefit, the beneficiary of a relation may entrust the fiduciary with custody over property of one sort or another. The question of whether a fiduciary relationship existed between the defendant and the clients of Tandem Management is a question of fact for you to decide.

Because the fiduciary obtains access to property

of another to serve the ends of the fiduciary relationship, a person who voluntarily undertakes to act as another's fiduciary tacitly represents that, except as disclosed to the other person, he intends to act solely for the interest of the other person with respect to the property entrusted to him and will not appropriate the property for his own use. Moreover, the law imposes on one who undertakes to act as another's fiduciary an affirmative duty to disclose fully and frankly to his client any financial interest of the fiduciary in the transactions or business conducted on behalf of the other person. A person (i) who deceives another into entrusting property to him on the false pretense that he will manage the property solely for the other person's interest, or (ii) who deliberately fails to disclose to the person for whom he acts as fiduciary his own fiduciary interest in the transactions or business which he conducts in a fiduciary capacity for that person has engaged in a form of deceit or misrepresentation.

You need not find that the scheme was devised or carried out in all the ways alleged in the indictment – i.e., through false or misleading representations in a Form ADV; false or misleading representations in an investment advisory agreement; or breaches of duties of disclosure and candor owed by a fiduciary to its principal. To satisfy the "scheme to defraud" element of the charges, however, you

must find beyond a reasonable doubt that a scheme to defraud existed as I have instructed you and that it was devised or carried out in at least one of the ways alleged in the indictment. And, just as with every element I have previously described to you, you must unanimously agree on at least one of the ways in which it was devised or carried out.

Counts 13 through 15 charge the defendant with making false and misleading statements on registration applications and amendments thereto filed with the Securities and Exchange Commission. Those charges read as follows:

"37. The allegations of paragraphs 1 through 9, and 11 through 21 are repeated and realleged as though fully set forth herein.

"38. On or about the dates set forth below, in the Southern District of New York, William F. Branston, the defendant, unlawfully, willfully, and knowingly did make untrue statements of material fact, and omit to state material facts which were required to be stated in the following registration applications on Forms ADV filed with the Securities and Exchange Commission under Title 15, United States Code, Sections 80b-3 and 80b-4, and Title 17, Code of Federal Regulations, Section 275.203-1:

"Count 13; date of Form ADV, March 25, 1992;

approximate filing date, March 30, 1992; Form ADV item number, 12A/12B, Schedule F; subject of misstatement, brokerage commission/use of 'soft-dollar' rebates.

"Count 14; date of form ADV, March 29, 1993; filed approximately June 1, 1993; Form ADV item number, 18B; subject of the misstatement, aggregate value of securities portfolios that Tandem managed for clients.

"Count 15; Form ADV dated April 11, 1994; filed approximately April 25, 1994; item 18B; subject, aggregate value of securities portfolios that Tandem managed for clients."

The relevant statute on this subject is Section 207 of the Investment Advisors Act, which provides, in relevant part: "It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the [Securities and Exchange] Commission under Section 203, or 204 of this Act, or willfully to omit to state in any such application or report any material fact which is required to be stated therein."

Section 203 of the Investment Advisors Act requires investment advisors to register with the Securities and Exchange Commission and provides that they may register by filing with the SEC an application on a form prescribed by SEC. By rule, the SEC requires the filing of a Form ADV

setting forth certain categories of information concerning the investment advisor.

After explaining the purpose of this statute, I will review with you the elements that you must consider in determining whether the defendant violated this statute.

The purpose of the false statement law is to protect the authorized functions of the Securities and Exchange Commission from any type of misleading or deceptive practice and from the adverse consequences that might result from such deceptive practices. To establish a violation of the false statements law, it is necessary for the government to prove certain elements – which I will describe for you in a moment – beyond a reasonable doubt. However, I want to point out now that it is not necessary for the government to prove that the SEC or any investor was, in fact, misled as a result of the defendant's action. It does not matter if the SEC was not misled, or even if it knew of the misleading or deceptive act, should you find that the act occurred. These circumstances would not excuse the commission of this crime.

In order to find the defendant guilty of violating Section 207, you must find that the government has proved each of the following two elements beyond a reasonable doubt:

First, that on or about the date specified in the

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indictment, the government defendant either made an untrue statement with respect to a material fact on a registration application filed with the SEC; omitted to state any material fact which was required to be stated on the application; or aided and abetted another person in making such untrue statements or omissions; and

Second, that the defendant acted unlawfully, willfully, and knowingly in making the untrue statement or omission or in aiding and abetting someone else to do so.

I have already explained most of these concepts and terms to you in the context of the other instructions, and the same definitions and rules apply to this charge.

In instructing you on all of the substantive counts of the indictment that I have discussed so far – Counts 2 through 15 (but note particularly, not Count 1, the conspiracy charge) – I have made mention of "aiding and abetting." With respect to Counts 2 through 15, the indictment also charges the defendant with what is called "aiding and abetting." The aiding and abetting statute, Section 2(a) of Title 18 of the United States Code, provides that:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Under the aiding and abetting statute, it is not

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necessary for the government to show that the defendant himself physically committed the crime with which he is charged in order for you to find the defendant guilty. Thus, if you do not find beyond a reasonable doubt that the defendant himself committed the crime charged, you may, under certain circumstances, still find that defendant guilty of that crime as an aider and abettor.

A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find a particular defendant guilty of the substantive crime if you find beyond a reasonable doubt that the government has proved that another person actually committed the crime, and that the defendant aided and abetted that person in the commission of the offense.

As you can see, the first requirement is that another person has committed the crime charged. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associate himself in some way with the crime, and

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that he willfully and knowingly seek by some act to help make the crime succeed.

Participation in a crime is willful if the action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or disregard the law.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.

To determine whether a defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions: Did he participate in the crime charged as something he wished to bring about? Did he associate himself with the criminal venture knowingly and willfully? Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense.

If, on the other hand, your answer to any of these questions is no, then the defendant not an aider and

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abettor, and you must find him not guilty.

THE COURT: Let's take a quick break here.

(Pause)

THE COURT: Thank you for being so attentive. We don't have that much more to go.

I now turn to the final count of the indictment, Count 16. Count 16 charges the defendant with committing perjury in testimony before the Securities and Exchange Commission. Count 16 reads as follows:

"39. The allegations of paragraphs 1 through 9, 13 through 19, and 26e-g are repeated and realleged as though fully set forth herein.

"40. In or about September 1994, the examination staff of the SEC conducted an on-site examination of certain books and records of Tandem. As a result of information obtained during that examination, the SEC's northeast regional office located in New York, New York commenced an investigation to determine, among other things, whether William F. Branston, the defendant, and others had violated the laws of the United States, including by committing fraud in violation of Title 15, United States Code, Sections 80b-6.

"41. As that investigation progressed, it was material to the SEC's investigation to determine, among other things, whether William F. Branston, the defendant,

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had any knowledge of, or role in, Tandem's policies and practices with respect to obtaining reimbursement from securities brokers for 'soft-dollar' services.

"42. On or about May 25, 1995, in the Southern District of New York, William F. Branston, the defendant, having taken an oath before a competent tribunal, officer, and person, in a case in which a law of the United States authorized an oath to be administered, that he would testify, declare, depose, and certify truly, did appear before the SEC at the SEC's northeast regional office in New York, New York, and unlawfully, willfully, and knowingly, and contrary to his oath, did make the declarations underscored below which were material to the SEC's investigation and which Branston did not believe to be true:

"Q. Did you ever send a bill to a soft-dollar broker that you knew had already been paid or reimbursed by another broker or by that same broker?

"A. Not intentionally, no.

"Q. Did you ever direct anyone else to send a bill to a soft-dollar broker that had already been paid or reimbursed by another broker or the same broker?

"A. No.

"Q. Did you ever learn that Tandem had received payment more than once for particular bills prior to the time of the SEC examination of Tandem in 1994?

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"A. No.

"Q. Did you learn that during the SEC examination in 1994?

"A. Yes."

Perjury is a violation of 18 U.S.C. Section 1621, which provides in pertinent part as follows:

"Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly . willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, [is guilty of a crime]."

I instruct you that the law of the United States authorizes an oath to be administered in an investigation conducted by the Securities and Exchange Commission.

The administration of justice depends upon respect for the sanctity of an oath. Essential to the administration of justice and the enforcement of the laws is that those called upon to testify before competent tribunals empowered by law to administer oaths give truthful testimony.

This federal court is such a tribunal, and there are other such bodies, such as a grand jury or a regular jury, like yours, as well as other official bodies before

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whom oaths are administered, such as the Securities and Exchange Commission. Witnesses appearing before such bodies, whether voluntarily or under the compulsion of a subpoena, take an oath to tell the truth, the whole truth, and nothing but the whole truth, just as you have heard that oath administered in this courtroom to every witness who testified before you.

Once under such an oath, the witness is bound to tell what he knows in answer to the question asked, for the purpose of bringing out the truth of the matter under inquiry.

(Continued on next page)

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Simply stated, perjury is the willful giving of false testimony before a competent tribunal while under oath knowing the testimony is false as to a material matter.

In order to prove the perjury charge against the defendant, the government must establish beyond a reasonable doubt each of the following four elements:

First, that the defendant took an oath to testify truthfully before the Securities & Exchange Commission, a body authorized by law to administer oaths;

Second, that the defendant made false statements as to matters about which the defendant testified under oath as set forth in the indictment;

Third, that such false statements were willfully made, in that at the time the defendant made these statements, the defendant knew them to be false; and

Fourth, that the matters as to which it is charged the defendant made false statements were material to the issues under inquiry by the Securities & Exchange Commission.

In order to prove the first element, the government need only show that the defendant was placed under oath to tell the truth when the testimony was given. Here the government alleges that the defendant appeared before a notary public on the staff of the Securities & Exchange Commission on May 25, 1995 and took an oath on tha

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day to testify truthfully.
The second element the government must prove beyond a reasonable doubt is the falsity of the testimony in question. You must determine whether the testimony underlined in the indictment was false. An answer to a question is false when it is contrary to fact; that is, when it's not true.
The truth or falsity of an answer must be determined by the facts existing at the time the answer was made. In reviewing the testimony which is alleged to have been false, you should consider such testimony in the context of the sequence of questions asked and answers given. The words used should be given their common and ordinary meaning unless the context shows that a different meaning was understood by both the questioner and the witness. The burden is on the government to establish beyond a reasonable doubt that the declarations or answers made by the defendant were, in fact, false.
Count 16 contains answers given by the defendant reciting more than one fact. It is not necessary that the government prove that each of these factual statements is false. The government satisfies its burden of proving falsity if it proves beyond a reasonable doubt that any of the factual statements recited in Count 16 is false.
However - and this is important - you may not

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find the defendant guilty unless you all agree unanimously that one particular answer is false. It's not enough that you all believe that some answer given by the defendant is false; that is, you cannot find the defendant guilty if some of you think that only Answer A is false and the rest of you think that only Answer B is false. There must be at least one specific answer that all of you believe is false in order to convict the defendant.
If you should find that a particular question was ambiguous; that is, subject to more than one interpretation, and that the defendant truthfully answered one reasonable interpretation of that question under the circumstances presented, then such an answer would not be false.
Similarly, if you should find that the question was clear, but the answer was ambiguous, and one reasonable interpretation of such answer would be truthful, then such answer would not be false.
In deciding whether the defendant's answers are false, the answers must be given their natural meaning in the context in which the words were used. If you find that an answer given by the defendant was literally true but unresponsive to the question asked, you may not find that answer false or convict the defendant because of it. As long as a statement or a reasonable interpretation of a statement is narrowly or literally true, there can be no

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conviction for perjury. This is so even if you find the answer was intentionally misleading.
Now I've instructed you that the government must establish beyond a reasonable doubt that the defendant's answers were false. The law has a special rule for the amount of proof required to show that the defendant's statements were false. Simply put, the rule is that in order to convict the defendant of perjury, the falsity of the defendant's statements must be established either by the testimony of two witnesses whose testimony you, the jury, believe to be true or by the testimony of one such witness which is corroborated or confirmed by other independent evidence, such as documentary evidence, which you believe and which you find to be trustworthy and to substantiate the testimony of that witness.
"Independent" means something other than and in addition to the testimony of the one witness. When I say that the falsity of the defendant's statements must be established, I mean that the falsity of the set of facts which the defendant stated must be established. The witness or witnesses whose testimony is offered to establish this falsity need not - and in most cases will not - know what the defendant's actual statement was or even whether the defendant gave such statements at all.
Where the falsity of facts which the defendant

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stated is established by the testimony of one witness and other independent evidence which corroborates or confirms that witness' testimony, the rule does not require that the corroborative evidence itself prove guilt. The rule is satisfied when there is direct testimony from one witness and some additional independent evidence so corroborative of this direct testimony that the two when considered together are sufficient to establish the falsity of the defendant's statements beyond a reasonable doubt.
The rule requires the government to prove in evidence something more than one witness. Thus, if one witness testifies under oath as to certain facts and at a later date another person testifies to the contrary, the testimony of the second individual alone without any other corroborating evidence would not be sufficient to convict the first person of perjury.
To support a conviction, the government must produce either a second witness or independent evidence that corroborates a second witness' testimony establishing the falsity of the facts which the defendant stated.
If you decide that any of the answers the defendant gave were false, then you must then decide whether the defendant gave that answer or those answers knowingly and willfully; that is, at the time the answers were given, did the defendant know and believe that those answers were

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false and, if so, did the defendant give the false answers consciously and in the exercise of his free will.

Unless you find beyond a reasonable doubt that the defendant both knew that an answer was false and that he purposefully or intentionally gave a false answer, you may not find the defendant guilty with respect to that answer.

The requirement that you find the defendant acted knowingly and willfully means that you may not find the defendant guilty of perjury simply because the defendant gave testimony which is factually incorrect. The defendant may have given incorrect testimony because of an honest mistake of facts, confusion, haste, oversight or carelessness.

If the defendant made an erroneous and incorrect statement, if it was through a slip of a tongue, or bad memory, or through misunderstanding, the defendant would not be guilty of making a false statement knowingly and willfully.

Your decision whether the defendant acted knowingly and willfully in making any misstatement you find to be false involves a decision about the defendant's state of mind at the time the statements were made. It is obviously impossible to ascertain or to prove directly what the operation of the defendant's mind was. You certainly can't look into a person's mind and see what his state of

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mind is or was, but a wise and intelligent consideration of all the facts and circumstances shown by the evidence and the exhibits in the case may enable you to infer with a reasonable degree of accuracy what the defendant's state of mind was.

In our everyday affairs we are continuously called upon to decide from the actions of others what their state of mind is. Experience has taught us that frequently actions speak louder than words, more clearly than spoken or written words. Therefore, you may well rely in part on circumstantial evidence in determining the defendant's state of mind.

Proof of the circumstances surrounding the defendant's action can supply an adequate basis for finding that the defendant acted knowingly and willfully. The actions of an individual must be set in their time and place. The meaning of a particular act may depend on circumstances surrounding it.

Thus, you may consider the evidence which you recall and believe about the defendant's actual knowledge of certain facts and occurrences as compared to the testimony he gave about the facts and occurrences, the extent to which statements were made to conceal facts and in general the manner in which certain actions were undertaken by the defendant and by others with his knowledge.

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You may consider whether the defendant had a motive to lie and conceal the facts. The government is not required to prove the existence of such a motive, let alone exactly what the motive was. The government's failure to prove a motive does not establish lack of guilt, but if you do find evidence of a motive, that may help you decide what the defendant's state of mind was. Therefore, you should ask yourselves whether the defendant stood to gain any personal benefit from concealing the truth or whether he stood to avoid any personal liability.

The fourth element that you must find beyond a reasonable doubt is materiality. You must find that the matters as to which the defendant gave false testimony were material to the issues under investigation by the Securities & Exchange Commission. Materiality is demonstrated if the question posed is such that a truthful response could potentially have aided the Securities & Exchange Commission's investigation and a false answer could potentially have hindered the investigation.

Put another way, if the false testimony was capable of influencing the inquiry or investigation of the Commission, or had a natural effect or tendency to impede or dissuade the Commission from pursuing aspects of its investigation, then the false testimony is material.

Thus, the government is not required to

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demonstrate that the false testimony actually impeded the Commission's investigation or even that the false testimony probably impeded the investigation. Materiality must be decided in full context; the issue does not turn simply on whether a particular question standing alone could have evoked a material reply.

Now, under your oath as jurors, you cannot allow considerations of punishment that might be imposed upon a defendant, if convicted, to influence your verdict in any way or in any sense to permit it to enter into your deliberations, nor should you allow any opinions you might have about the nature of the crimes charged to enter into your deliberations. Your function is to weigh the evidence in the case and to determine your verdict as to the defendant on the basis of the evidence and upon the law as I've instructed you.

You must not be influenced by any assumption, conjecture or sympathy or any inference not warranted by the facts. Your concern is to determine whether or not, with respect to each count on the evidence before you, the guilt of the defendant has or has not been proved beyond a reasonable doubt.

If you fail to find beyond a reasonable doubt that the law has been violated by the defendant, you should not hesitate for any reason to return a verdict of

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(At side bar)
THE COURT: Ladies and gentlemen, comments?
MR. ROSS: Judge, we just reiterate our previous objection to the lack of a handwriting expert charge and the lack of convergence charge simply for the record.
THE COURT: Thank you, Mr. Ross.
The government?
MR. OWENS: We have only one comment, your Honor.
We think it might speed the jury's deliberations and the notes that might come out for exhibits if your Honor allows the jurors if they wish to take back the binders and other copies of exhibits we have distributed to them for use in their deliberations, since the contents are in evidence, and it may just speed things along and save us a lot of time having to respond to notes for individual documents.
MR. ROSS: Judge, I think we ought to rely on the jury's discretion and decision in this area and simply await notes, if any, for particular exhibits. I think Mr. Owens' suggestion to provide a selection of exhibits –
THE COURT: We'll wait for notes.
Anything else?
MS. CARVLIN: No.
MR. CANELLOS: No your Honor.
(Continued on next page)

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(In open court)
THE COURT: Ladies and gentlemen, we have concluded the instructions on the law. As you know, you may take with you your copy of the charge. Ms. Siwik will bring into you a copy of the indictment and several copies of the verdict form for your use.
The manner in which you conduct your deliberations is up to you. As you know, your lunches are there. It is our plan to work today until approximately 4:00 o'clock, at which point we'll go home, you will return at whatever time you desire in the morning, and you'll work till whatever time you need to tomorrow as you see fit. It is all up to you. Thank you for your attention, ladies and gentlemen. You may take your charges in, you may leave your binders here. As I mentioned to you in the charge, there is a method for asking for exhibits. Would you wait one moment, please.
(The marshal was duly sworn)
THE CLERK: The alternate jurors are discharged at this time. You may go into your jury room and get your belongings.
THE COURT: Thank you, ladies and gentlemen.
(The jury left the courtroom at exactly 1:40 pm to begin deliberations)
THE COURT: Anything further, counsel?

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MR. ROSS: Judge, may I just say something to you off the record?
THE COURT: Yes, sir.
(Off-the-record discussion)
(Luncheon recess)
(Adjourned to April 29, 1998)